Kwong Yik Bank Bhd v Serlow Travels Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2(S7)-24-1913 OF 1989
KAMALANATHAN RATNAM J
19 JUNE 2000

Civil Procedure *— Appearance — Body corporate — Representative obtained leave of court to act for defendant — Whether body corporate may enter appearance or defend action without its solicitor — Rules of the High Court 1980 O 12 r 1(2)*

Civil Procedure *— Service — Post, service by — Personal service not effected — Summons-in-chambers sent to last known address stated in last affidavit sworn by defendant's representative — Whether deemed good service*

The appellant appealed against the decision of the learned senior assistant registrar given on 15 December 1999 in respect of encl 140 which was the plaintiff's application for various orders including a prayer to fix a date, place and time for the auctioning of the defendant's property. On 9 February 2000 when the appeal was set to be heard, one Tan (the appellant/defendant's representative) did not appoint any solicitors, but decided to argue the appeal personally on behalf of the appellant. He argued that since he had filed affidavits on behalf of the appellant, to which the plaintiff's legal firm had replied, the plaintiff's solicitors therefore could not be said to argue that he had no authority to act. He also contended that he was not even served with a copy of the summons (encl 140) and that the plaintiff (respondent), as reflected in these proceedings, was no longer a legal entity and therefore could not be a party, since the plaintiff had not seen it fit to amend the name.

Held, dismissing the appeal:

(1) Order 12 r 1(2) of the Rules of the High Court 1980 states that a defendant which is a body corporate may not enter an appearance to an action or defend it otherwise than by a solicitor. Notwithstanding the fact that Tan had obtained leave of the court to act as the defendant's representative, that still did not excuse him from complying strictly with the requirements of the Rules of the High Court which govern the procedures regulating the business of the court (see p 598F–H).

(2) Whilst the summons in chambers was not served personally on Tan, it was sent by post to the last known address which was the address given in the last affidavit (encl 98) sworn by Tan (see p 598H–I). The respondent did not amend the name on the writ as there was an order which provides for the present plaintiff/respondent to continue with the action in its former name (see p 599A–C).

[Bahasa Malaysia summary

Perayu telah merayu terhadap keputusan penolong kanan pendaftar yang diberikan pada 15 Disember 1999 berkenaan dengan lamp 140 yang merupakan permohonan plaintif untuk pelbagai perintah termasuk permohonan untuk menentukan tarikh, tempat dan masa untuk melelong hartanah defendan. Pada 9 Februari 2000 apabila rayuan ditetapkan untuk pendengaran, seorang bernama Tan (wakil defendan/perayu tersebut) tidak melantik sebarang peguam, tetapi berkeputusan untuk menghujahkan rayuan tersebut sendiri bagi pihak perayu. Beliau menghujahkan bahawa oleh kerana beliau telah memfailkan afidavit-afidavit bagi pihak perayu di mana firma guaman plaintif telah membalas, peguam plaintif tidak boleh dilihat menghujahkan bahawa beliau tiada kuasa untuk bertindak. Beliau juga menegaskan bahawa beliau tidak disampaikan salinan saman tersebut (lamp 140) langsung dan bahawa plaintif (responden), seperti yang dibayangkan di dalam prosiding-prosiding, bukanlah lagi entiti undang-undang dan dengan itu bukanlah suatu pihak, oleh kerana plaintif merasakan tidak perlu untuk meminda nama tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Aturan 12 k 1(2) Kaedah-Kaedah Mahkamah Tinggi 1980 menyatakan bahawa seorang defendan yang merupakan sebuah badan korporat tidak boleh memasuki kehadiran kepada suatu tindakan atau membelanya selain melalui seorang peguam. Walau sekalipun hakikat bahawa Tan telah memperolehi kebenaran mahkamah untuk bertindak sebagai wakil, defendan tidak memberikan alasan kepadanya untuk tidak mematuhi secara ketat keperluan Kaedah-Kaedah Mahkamah Tinggi yang mengawal prosedur-prosedur berkenaan dengan aturan mahkamah (lihat ms 598F–H).

(2) Walaupun saman dalam kamar tidak disampaikan secara peribadi kepada Tan, ia telah dihantar melalui pos ke alamat terakhir yang diketahui yang merupakan alamat yang diberikan di dalam afidavit terakhir (lamp 98) yang diikrar oleh Tan (lihat ms 598H–I). Responden tidak meminda nama di atas writ oleh kerana terdapat perintah yang memperuntukkan plaintif/responden untuk meneruskan tindakan tersebut di dalam nama dahulunya (lihat ms 599A–C).]

Notes

For cases on appearance generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 965–989.

For cases on service by post, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4132–4133.

Legislation referred to

Rules of the High Court 1980 O 12 r 1(2)

N Nadkarni (*Douglas Lee* and *WL Tan* with him) (*Lee Hishammuddin*) for the respondent/plaintiff.

Tan Ser Low as representative of appellant/defendant.

Kamalanathan Ratnam J:

The appeal

This is the defendant/appellant's appeal against the learned senior assistant registrar's ('SAR') decision given on 15 December 1999 in respect of encl 140 which was the plaintiff's application for various orders including a prayer to fix a date, place and time for the auctioning of the defendant's property ('the property').

Facts

An order for sale in respect of the defendant's property had already been made much earlier. Subsequently, 12 different auction dates were fixed for the public auctioning of the property. Finally, the 13th attempt fixed on 30 September 1999 was called off, as there was no offer. The original reserve price fixed was for RM5,103,000. Since 13 attempts had been made, the plaintiff now prayed for a reduction of the reserve price to RM4,592,700, being a 10% reduction.

The preliminary objection

On 12 January 2000 when the appeal against the learned SAR's decision came up before me, Mr Nadkarni raised a preliminary objection contending that Tan Ser Low ('Tan') who appeared before me to represent the defendant/appellant ought not to be allowed to do so as he had been declared a bankrupt and therefore ought to have no authority to act as the representative of the defendant/appellant.

In response Tan produced a copy of a court order dated 30 January 1996 in respect of Originating Summons No D4–24–34–96 wherein the learned judicial commissioner had made an order granting the said Tan liberty to intervene in these proceedings and in that respect to make any application as the director of the defendant/appellant. Having seen a copy of the order and being satisfied, I made an order allowing Tan to represent the defendant/appellant in the proceedings before me. Tan then asked for an adjournment to be able to appoint solicitors. I then adjourned proceedings to 9 February 2000.

Findings of the court

On 9 February 2000, Tan did not appoint any solicitors, but decided to argue the appeal personally on behalf of the defendant/appellant. He contended that before the learned SAR, counsel for the plaintiff wilfully

misled the court to believe that he (Tan) had no leave to act on behalf of the defendant. He argued that since he had filed affidavits on behalf of the defendant/appellant, to which the plaintiff's legal firm had replied, the plaintiff's solicitors therefore could not be said to argue that he had no authority to act since they already knew of his authority to act.

His next issue was that he was not even served with a copy of the summons (encl 140). As to how he knew of the hearing date on 15 December 1999 he said that when he contacted the plaintiff bank on 10 December 1999 to enquire of his settlement proposal, he was informed by the bank of the latest application to obtain the auction date, fixed for hearing on 15 December 1999.

His third argument was that the plaintiff, as reflected in these proceedings, is no longer a legal entity and therefore cannot be a party, since the plaintiff had not seen it fit to amend the name. At this stage, Mr Douglas Yee, who appeared for the plaintiff/respondent, sought an adjournment before replying.

On 14 February 2000, Mr Nadkarni appearing for the respondent read out the minutes of the proceedings before the SAR on 15 December 1999 in respect of the first issue raised by the appellant. I reproduce verbatim the note as recorded which reads as follows:

> Cik Tan: Pohon tarikh lelong yang baru.
>
> Encik Tan: Pohon tangguh untuk lantik peguamcara untuk membela kes ini. Saman dalam kamar tidak diserahkan kepada saya.
>
> Cik Tan: Beliau adalah seorang bankrap. Responden tidak layak menjadi peguamcara. Beliau tiada locus untuk kata apa-apa hari ini. Defendan telah tukar peguamcara dua kali. Peguamcara telah tarik diri pada 4 May 1999. Permohonan untuk lamp 117 defendan telah dapat kebenaran. Tangguhkan untuk defendan lantik peguamcara yang baru.

It was the submission of the respondent that its counsel took the stand before the learned SAR under O 12 r 1(2) of the Rules of the High Court 1980 which states that a defendant which is a body corporate may not enter an appearance to an action or defend it otherwise than by a solicitor.

To my mind, this is a reasonable submission. In any case as an appeal before me is by way of re-hearing, even if this was not raised before the learned SAR and since it is now raised before me, I accept the said submission. Notwithstanding the fact that Tan has obtained leave of the court to act as the defendant's representative that still does not excuse him from complying strictly with the requirements of the Rules of the High Court 1980 which govern the procedures regulating the business of the court.

In respect of the next issue counsel for the respondent pointed out that whilst the summons in chambers was not served personally on Tan it was sent by post to the last known address which was the address given in the last affidavit (encl 98) sworn by Tan. However to a question from the court as to whether that was his last known address Tan informed me in open court that he had moved out of that address four years ago. If that was so,

I fail to understand why Tan stated that same address as his address for service in his affidavit (encl 98) unless it was specifically calculated to mislead the respondent herein and to plead non-service in the event of any service of a document to that address.

In respect of the third issue, Mr Nadkarni submitted that the respondent did not amend the name on the writ because Kwong Yik Bank Bhd has merged with DCB Bank Bhd which has now become Rashid Hussein Bank Bhd. A copy of the said order had been exhibited to encl 87 as exh A-1. Para (f)(xi) of the said order reads as follows:

> all legal proceedings, arbitration, tribunal and other proceedings in connection with the Business as defined in para (a) above, which have not been completed and in which or where the Transferor is a party can be continued as if the Transferee is a party which replaces the Transferor; ... .

Since the order provides for the present plaintiff/respondent to continue with the action in its former name, I find no merit in the appellant's third argument. I was therefore satisfied that the appeal was a clear attempt to frustrate the bank's attempt at foreclosure. In the circumstances, I dismissed the appeal with costs.

Appeal dismissed.

Reported by Benjamin Yong